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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 227.

HENRY P. LYONS, PETITIONER,

VS.

WILLIAM R. BAKER, EDWARD BRUCE JOSE, HENRY CABRE, JOHN LAW, JR., GEORGE CASPER, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your petitioner, Henry P. Lyons, who was a duly elected and acting Commissioner of City of Stuart, Florida, at the time of the matters complained about, respectfully petitions this Honorable Court for a writ of certorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The parties involved are as follows, your petitioner who was a duly elected and acting Commissioner for the City of Stuart, Florida, and as such a citizen of Florida. That the respondents, William R. Baker, Edward Bruce Jose, Henry Cabre, John Law, Jr., and George Casper were members of the grand jury for Martin County, Florida and who in breach of their oath of silence published a defamatory statement in regard to the petitioner and therein stated what they claimed certain hostile witnesses had testified to before them as grand jurors.

That your petitioner sued the respondents for libel in the federal court for the Southern District of Florida by virtue of Title 8, Sections 41-48, for the violation by officers of the State of Florida in denying your petitioner due process and equal protection of the laws.

The United States District Judge assumed jurisdiction of the case but dismissed said action on the ground the said libel was ratified by another state official, while the Circuit Court of Appeals dismissed the action, on a question that was not assigned as error and on the ground the federal court had no jurisdiction of such claims and without remanding the cause to allow the complaint to be amended, if necessary.

A petition for rehearing was filed in the Circuit Court of Appeals but this was denied May 3rd, 1950, and the mandate was sent down on May 19th, 1950.

The case involves the question of whether a citizen of state who through its officials has been denied due process and equal protection of its laws can under Title 8, Sections 41-48, apply for redress in the federal court.

It also involves the question of whether the Circuit Court of Appeals denies the petitioner due process of law when it determines an appeal and dismisses it on some ground that was not assigned as error and was not before it on appeal.

THIS COURT HAS JURISDICTION.

By this petition, petitioner seeks to review a final judgment and decree of the United States Court of Appeals for the Fifth Circuit, which did not affirm the final judgment of the District Court but dismissed the appeal on the ground the trial court had no jurisdiction to proceed in the case.

Jurisdiction to review such final judgment and decree is accorded by Title 28, Section 1234, F. S. A.

This case presents issues of federal law of grave importance in that can the State of Florida acting through its judicial officials use the authority and knowledge acquired as grand jurors and which they are under oath to keep secret, to libel and defame public officials who may have gained their enmity by seeking to have the laws enforced.

In other words can a grand jury summons hostile witnesses before them and be used as a vehicle to defame those who seek to uphold the law, by breaking their oath of silence and maliciously publishing what such witness may have testified to, instead of bringing in a true bill and allow the injured party an opportunity to defend himself and are they immune from suit because the circuit judge joins in and authorizes a further publication of the so called report.

That the District Court has decided an important question of federal law in that it held the circuit judge could

ratify such wrongful acts and so relieve the grand jurors from liability. This court has not passed on that question.

That the Court of Appeals has decided an important question of Federal law in probable conflict with applicable decisions of this Court when it holds that in such cases the State of Florida does not deny its citizens due process of law or equal protection of the law, when its officials acting in their official position use their said offices for any such purpose and contrary to applicable decisions of other Circuit Courts of Appeal.

QUESTIONS PRESENTED.

1. The main question is, can the State of Florida, acting through its officials deprive the petitioner of due process and equal protection of the law, when acting in their official capacity, such officials bring in no true bill or information but apparently not believing the testimony of the witnesses and which they are under oath not to disclose, publish the same and harm and injure the petitioner and who has no other method to protect his good name than sue them for libel and make them prove what they published was true and can such a suit be brought in the federal court under Title 8, Sections 41-48, when it appears that by the publication of such a report, the judge who ratified such methods is prejudiced and also the petitioner's reputation and good name has been injured in the County in which the suit would have to be brought if initiated in the State Court.

2. The second question is, if no error or cross error had been assigned on the grounds the district court lacked jurisdiction of a suit of this nature, can the appellate court raise it of its own motion and dismiss the case for that reason or should it remand the case and let the trial court

determine that question and so allow the petitioner due process of law.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The District Court appears to have recognized that it had jurisdiction of such claims but decided it on the ground that another state official, the circuit judge, could authorize the grand jurors to defame the petitioner but as far as your petitioner is informed, this court has not passed on that question.

2. This court has held in

Lucher v. *Knight*, 217 U. S. 257,

> Where the circuit court of appeals passes on a question not raised by either party below, plaintiff in error is substantially denied his day in court.

In *Lanier* v. *Nash*, 122 U. S. 630, this court said:

> A case cannot be dismissed on appeal for want of jurisdiction because the court below, *ought to have dismissed it*, as that is a question going to the merits of the appeal.

In *Grace* v. *American Insurance Co.*, 109 U. S. 279, this court raised the question of the jurisdiction of the trial court on its own motion it passed on the merits reversed the judgment and remanded the case to the trial court to vacate its judgment and allow the plaintiff to amend to state sufficient jurisdictional facts.

In *Morton* v. *Larney*, 266 U. S. 511, this court held that if the complaint or the record states sufficient jurisdictional facts on its face to establish that beyond dispute, the Supreme Court will consider the bill as sufficient and sustain the jurisdiction of the trial court.

So it appears that the Court of Appeals has decided this case in a manner not in accord with the applicable decisions of this court while the District Court decided the case in probable conflict with the applicable decisions of this Court, or that question has not been decided by this Court and therefore should be settled by this Court.

That the Fifth Circuit Court of Appeals has decided a substantial question of federal law in a manner contrary to the decision of the Court of Appeals for the 2nd Circuit in *Pickering* v. *Pennsylvania R. R. et al.*, 151 F. 2d 240, in that that court held the federal court had jurisdiction of such a claim.

Wherefore the Petitioner prays that this Court will issue its writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the end the important and substantial questions of federal law herein presented may be decided and settled.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

OPINIONS OF COURTS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is reported in 180 F. 2d 893. The opinion of the District Court is not reported and appears on page 21 of the record on the appeal to the Court of Appeals.

JURISDICTION.

This Court has jurisdiction to review this matter under Title 28, Sec. 1254, F. S. A., as set out in the forego-

ing petition, and such statement is adopted and made a part of this brief.

STATEMENT OF CASE.

The Summary Statement of Matters Involved in the preceding petition states the case and which is also adopted and made a part of this brief.

ASSIGNMENTS OF ERROR INTENDED TO BE ARGUED.

1. The District Court erred in dismissing the complaint on the grounds the circuit judge had approved and ratified the publication of the secret information.

2. The Court of Appeals erred in dismissing the case on its own motion and not on any error assigned.

ARGUMENT.

FIRST QUESTION.

The District Court erred in dismissing the complaint on the grounds the circuit judge had approved and ratified the publication of the secret information.

Justice Field's celebrated charge to the grand jury cited in *Behurb* v. *Kalamazoo* and reported in 1916E Anno. Case 223, pointed out the limitations on the use of information received from the witnesses by the grand jury and which limitation is accepted as the law in such cases and therefore the judge should have suppressed this malicious report instead of joining in the conspiracy to libel the petitioner, and so permit them to claim immunity from suit for acts done outside the scope of their authority. All this report attempts to do is to whitewash those whose duty it was to enforce the laws against gambling, it admits gambling is prevalent but if the respondent Baker had been required to answer the relevant interrogatories this whitewash might have been removed just as it was in the Kefauver investigation, but it maliciously winds up and says we think the public should know what the hostile witnesses said about Lyons. *Bennett* v. *Stackhouse,* 163 N. W. 482, 1918E Anno. Case 1193, is on all fours with the present case except the injured person did not sue in the Federal Court.

The recent expose' of the Kefauver Committee at the hearings in Miami, Florida, shows how honest public officials who seek to do their duty or have the laws against gambling enforced are exposed to attacks by racketeers to discredit them or defeat them if they run for public office

and so make examples of them and deter others. Judge Milliedge testified that even the judges were afraid to enforce the laws when such people were concerned, and if the state courts are controlled or intimidated by such people, what redress can the injured person have in those courts, such a plaintiff would be defeated before he ever started his suit for redress in the state court.

Congress in passing Title 8, Sections 41-48, recognized this to be a fact and so opened the door of the federal courts to such people for redress.

This presents a grave question of national importance, and the construction of what situations Congress intended to provide a remedy in the federal courts for.

If the grand jury believed the testimony of these witnesses and felt it was sufficient to justify a true bill it was their duty to find one and afford the petitioner due process of law and an opportunity to defend himself against such accusations even though on their face they are entitled to no credit. And if true bills are brought against others then the respondent is entitled to equal protection of the laws and have the same right to defend as do others who are charged by a grand jury.

How else can he defend against and expose the falsity of these charges and what privilege do the grand jurors and the state judge have to conspire to defame the petitioner? The grand jury system does not allow the grand jurors to summon or accept the voluntary testimony of hostile witnesses and then without bringing in a true bill, publish what they may say about some other person and to permit such practice and claim they are privileged to do so, only makes it a vehicle for a purpose that was never intended or allowed.

How can the petitioner be expected to obtain redress when he has to sue these respondents in the state court and before the judge who entered into the conspiracy. Petitioner contends that Congress recognized that he could expect no aid before the state courts in such cases and therefore passed the law to provide his remedy in the federal court in such cases.

Sec. 833, F. S. A., defines a conspiracy as follows and makes it a criminal offense to become a party to one:

> If two or more people shall agree, combine or conspire or confederate to commit any offering or falsely or maliciously maintain any suit or to commit any act injurious to the public health or public morals or for the prevention or obstruction of justice or to prevent the due administration of the laws, shall be punished by imprisonment not exceeding one year or by fine not exceeding $500.

11 A. J. 580, Sec. 48.

The connection between the parties being established, what was done by one in pursuance of the conspiracy is considered the act of all regardless of whether the original party to the conspiracy and irrespective of the fact they did not actively participate therein or obtain any benefit therefrom.

The Florida court said in

Re Robinson, 165 So. 582:

> A grand jury should never under cover of presentment, present an individual in this manner, if it has legal evidence of the commission of a crime, it should find an indictment upon which he *can answer,* but if it has no such evidence, *in fairness it should be silent.*

Re Mooney, 294 U. S. 103:

> Action by a state's attorney may constitute state action within the purview of the amendment.

U. S. v. *Patrick,* 54 Fed. 338:

> A conspiracy against a public officer engaged in the performance of his duties cannot be regarded as directed against him solely in his representative capacity, but also as a citizen exercising the right of privilege of accepting public office and engaging in its functions and thereby comes under the protection guaranteed individuals.

Many of the cases arise from deprivation of civil rights by members of the state judiciary, whether it be a municipal official, a justice of the peace or the chief magistrate.

Picking v. *Pennsylvania R. R.,* 152 F. 2d 240.

All those concerned in the conspiracy were state officers, the grand jurors take their oath of office and are sworn in and paid by the State as does the circuit judge.

State v. *Cherry,* 6 Fla. 685, in speaking of grand jurors said:

> "It is not to be presumed that *officers* of such high dignity and upon whom such weighty responsibilities rest."

Picking v. *Penn. R. R.,* 151 F. 2d 240, 16th-22nd headnotes:

> Congress in enacting the civil rights act, made it broad enough to include *every person* and this includes *members of the state judiciary,* acting in this official capacity and *abrogated* the *absolute privilege* conferred upon judicial officers, in the performance of their duties.

State v. *Dubose,* 181 So. 11:

> A public official has a property right in his office to which he is entitled to judicial protection.

Ward v. *Maryland,* 79 U. S. 418:

> The right to have and hold personal property is protected by this clause.

Eltzen v. *Brown,* 50 So. 410:

> A public officer is entitled to be heard in the defense of any charge for which he may be removed.

Re Garland, 71 U. S. 333:

> The investigation of the accused was not conducted in the presence of the accused or his counsel.

10 A. J. 880, Secs. 5 and 7:

> The 14th Amendment forbids discrimination by the state that impairs the privileges and immunities of United States citizens and which injures them in their life, liberty, or property.

Lyons had a property interest in his office, *State* v. *Dubose, supra,* as well as his personal and business reputation all of which were violated by the State of Florida acting through such officials.

10 A. J. 895, Note 19:

> The fundamental principle pervading civil rights under the 13th, 14th and 15th amendments is guarantee of *impartial* equalities of rights and privileges, civil and political to all citizens of the United States *and of the state* where they reside, the right to protect life, liberty and property, by due process of law.

Petitioner contends that if the grand jury did not believe the testimony of the witnesses before them, then in fairness to him they should have kept silent.

121 A. L. R. 1148.

An extended note in 127 A. L. R. 273, and Anno. Case 1916E, 223, sets out what testimony a grand jury is privileged to disclose and as stated in

Re Grand Jury, 4 Haw. 780:

> It is a violation of their oath for a grand jury to divulge in a partial report and make unfavorable comments in regard to a person under investigation and citing among others, *Delmar* v. *Platt*, 192 So. 659; *Re Sunnyhayes*, 70 Fed. 769; *Parsons* v. *Age Herald*, 61 So. 345.

Of course an action to suppress the report would have availed nothing as the report was published and broadcasted before any action could have been brought.

The following cases hold it libel *per se* to publish false and malicious matter in regard to a public officer.

> *Laird* v. *Tampa Times*, 107 So. 130; *Re L'Engle*, 77 So. 270; *Harris* v. *Met. Pub. Co.*, 169 So. 206; *Met. Pub.* v. *Croswell*, 199 So. 568.

Title 8, Section 47-2, and Section 48, forbids such acts and extends to any person and as stated in *Picking* v. *Pennsylvania R. R. Co.*, it abrogates the common law privilege of a judicial officer to join in such a conspiracy or to do or authorize the grand jurors to deprive the petitioner of equal protection of the laws or due process of law.

So it is contended that the finding of the District Court that the jurors were absolved when the state judge ratified or authorized the report was without basic law and that holding should be reversed.

SECOND QUESTION.

The Court of Appeals erred in dismissing the appeal on its own motion and not on any error assigned.

While the 5th Circuit Court of Appeals appears to reach out for any excuse to avoid passing on an appeal on the grounds the court lacks jurisdiction, see *Green* v. *City of Stuart*, 91 F. 2d 603, where the time to take certiorari had long expired and the opinion had been written, 81 F. 2d 863, and the mandate was in the District Court and had never been recalled, the petitioner contends that to raise this question on its motion is in conflict with

Lanier v. *Nash*, 122 U. S. 630:

> A case cannot be dismissed on appeal for want of jurisdiction because the court *ought to have dismissed* it, as that is a question going to the merits of the appeal.

That unless the respondents assigned that as an error on the appeal that question was not before the court and it substantially deprives the petitioner of his day in court and a right to be heard on that question.

At the hearing on the appeal no such question was present or argued and this decision is in conflict with the decision of the Court of Appeals for the 2nd Circuit in *Picking* v. *Pennsylvania R. R.*, 151 F. 2d 240, because that court held that where a citizen of the State of New York had been deprived of his civil rights by the officials of the State of Pennsylvania, did present a substantial federal question and the fact the Attorney General of the State of Pennsylvania had authorized the act complained of

was no defense as the law was all inclusive and no person was exempt or privileged to violate the law or authorize anyone else to do so.

That if the petitioner is correct in this analysis of this question and as the Picking case points that even if the complaint is not clear the action should not be disposed on a motion to dismiss then the decision of the Court of Appeals that federal jurisdiction does not exist in such cases is probably in conflict with the applicable decisions of this court and also in conflict with the decision of the other Court of Appeals in the Picking case.

If state grand juries are to be used as a vehicle to libel and defame honest officials with the approval of the state judges, then no honest official in any state will be free from intimidation or loss of property or prestige, that results to his business and personal reputation or his political future, and destroys any basis for representative government. No honest man will seek or offer to obtain political office if when he seeks to have the laws enforced he will be subject to such attacks and the ones who injure him are immune from action in the federal court and that the Congress implemented the restrictions of the 14th Amendment and well recognized that when the state court has through its judicial officials so injured him, he would waste his time and money to sue the ones who did the wrong in the state court.

CONCLUSION.

For all the reasons set forth in this Brief and the preceding petition, your petitioner respectfully prays that this Court's writ of certiorari issue to the Court of Appeals for the 5th Circuit, in this cause, to the end that the important questions of federal law involved may be decided by this Court.

Respectfully submitted,

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